
In re	:	Chapter 11
	:	
UNITED STATES LINES, INC,	:	Case No. 86 B 12238 (AJG)
UNITED STATES LINES (S.A.) Inc.	:	(Jointly Administered)
	:	
Reorganized Debtors.	:	
	:	
	:	

OPINION GRANTING TRUST’S MOTION TO EXPUNGE PROOFS OF CLAIM
NUMBERED 03615700, 03615800, 03616500, AND 03619100 AND DENYING
MOTION TO EXPUNGE CLAIM NUMBER 03621100

A P P E A R A N C E S

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

At issue before the Court is whether to grant a motion by the United States Lines,
Inc. and United States Lines (S.A.) Inc. Reorganization Trust (the “Trust”) to expunge
proofs of claims of Fernando Arroyo (“Arroyo”), Alexandre J. Brin (“Brin”), John B.

Cruz, Jr. (“Cruz”), and Aaron B. Todalín (“Todalín”) (collectively, the “Claimants”), based upon the Claimants’ alleged failure to file such claims within the 180-day period permitted by the Court’s rolling bar date order. Upon consideration of the parties’ pleadings and oral arguments, the motion is granted in part and denied in part.

I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to section 1334(b) of title 28 of the United States Code and under the July 10, 1984 “Standing Order of Referral of Cases to Bankruptcy Judges” of the United States District Court for the Southern District of New York (Ward, Acting C.J.). Since the Trust’s motions concern disallowance of claims, they are core proceedings within the meaning of section 157(b)(2)(B) of title 28 of the United States Code. Venue is proper in the Southern District of New York pursuant to section 1408 of title 28 of the United States Code.

II. BACKGROUND

A. Pertinent Procedural History

On November 24, 1986, the Trust’s predecessors, United States Lines, Inc. and United States Lines (S.A.) Inc. (the “Debtors,” or individually, the “Debtor”), filed voluntary petitions for reorganization. The Trust is a result of the Debtors’ First Amended and Restated Plan of Reorganization, as amended, approved by orders of the Court dated May 16, 1989 and February 6, 1990. On February 23, 1990, the Trust became effective as successor-in-interest to the Debtors in administering asbestos and other bodily injury claims against the Debtors. John T. Paulyson serves as the trustee (the “Trustee”) of the Trust and as assignee and disbursing agent for the Debtors.

Since the early 1980s, studies have indicated that personnel in the maritime industry were at risk of asbestos exposure, which can lead to various health problems, usually associated with the lungs, chest and abdomen. Diseases from such asbestos exposure have long latency periods with upwards to 20 to 40 years elapsing between exposure to asbestos and manifestation of any related disease. Because asbestos-related diseases generally take a long time to manifest, many claims for damages are not immediately filed and thereby it is difficult for the Trust to determine which claims it has to address in order to administer and wind-up the Trust. These late-manifesting claims filed by maritime personnel of the Debtors after the Petition Date became the most significant administrative burden for the Trust.

Faced with the foregoing, the Trust determined that it was essential for its continued efficient administration, and ultimate termination, to establish filing requirements for those who wish to make claims. Accordingly, from time-to-time, the Trust made applications to the Court for orders establishing bar dates for filing proofs of claim.

In particular, the Trust made an application to the Court on April 27, 2000 for an order establishing, *inter alia*, a rolling bar date, so that asbestos-related and other late-manifesting bodily injury claims developing after the date of the applied-for order would have ninety (90) days from the date of manifestation to file a proof of claim. In its application, the Trust clarified that it applied for a rolling bar date to help begin the process of terminating the Trust's operations. By agreement with the same counsel who represent the Claimants, in its capacity as counsel for the majority of the asbestos

claimants in these cases, the application was modified by extending the rolling bar date from 90 to 180 days from the date of manifestation for filing a proof of claim.

On May 23, 2000, pursuant to Rule 3003(c)(3) of the Federal Rules of Bankruptcy Procedure, the Court established by order (the “Rolling Bar Date Order”), *inter alia*, a 180-day rolling bar date (the “Rolling Bar Date”) which provided that “individuals . . . that, in the future, come to hold a Claim against the Debtors that shall have manifested after the date of this Order . . . shall file a proof of such Claim . . . before the 181st day following manifestation [(the “Manifestation Date”)] of the underlying bodily injury which is the basis for such Claim.” In other words, a future late-manifesting claimant has 180 days after the Manifestation Date to file a proof of claim.

B. Prior Decisions by the Court in Connection with the Rolling Bar Date and the Dates of Manifestation

The Court has faced similar issues as the ones herein on multiple occasions. On June 25, 2003, the Court issued an unpublished Memorandum Decision and Order in this case concerning a motion by the Trust to expunge a proof of claim filed by claimant Paul Bence after the Rolling Bar Date (the “Bence Memorandum Decision”). The Court concluded, among other findings, that since the claimant was made aware of a major symptom or physical condition (that is, pleural effusion)¹ of his asbestos-related disease (that is, mesothelioma) on December 12, 2001, the Rolling Bar Date began to run on such manifestation date and that a proof of claim filed 273 days after the manifestation date was untimely.

On June 21, 2004, the Court issued another unpublished Memorandum Decision and Order in this case concerning a motion by the Trust to expunge proofs of claim filed

¹ A “pleural effusion” refers to an accumulation of fluid between the layers of the membrane lining the lung and the chest cavity. *See* Bence Memorandum Decision, at 5.

by claimants Norman M. Keating (“Keating”), John L. White (“White”), and George Murphy (“Murphy”) after the Rolling Bar Date expired (the “Keating Memorandum Decision”). The Court granted the motions to expunge the proofs of claim in that decision. The Claimants had argued, *inter alia*, that when their injuries were “manifest” should be determined by looking to federal laws governing occupational illnesses and injuries. The Court, however, determined that New York state law interpreting “manifestation of the underlying bodily injury” was the appropriate source for interpreting the Rolling Bar Date and when their claims manifested.

In Keating’s case, the Court found that a manifestation of his lung cancer occurred more than 180 days before Keating filed his proof of claim on November 27, 2002. A chest x-ray on April 18, 2002, revealed a lung mass that was confirmed by a computerized tomography scan (“CT scan”)² on April 30, 2002. The Court noted that Keating’s awareness of his underlying injury and its cause was irrelevant; “rather a manifestation of a consequential symptom or physical condition, such as the lung mass, begins the 180-day period under the Rolling Bar Date.” Keating Memorandum Decision, at 26. As for White, more than 180 days prior to filing his proof of claim, (1) he had experienced increased shortness of breath, (2) a chest x-ray revealed a large left pleural effusion, and (3) a CT scan revealed a pleural-based mass. *Id.* at 26. Thus, the Court accordingly found that his proof of claim was filed after the Rolling Bar Date expired. In Murphy’s case, more than 180 days prior to filing his proof of claim, an x-ray revealed a

² Computerized tomography scans refers to detailed pictures of structures within the body created by a computer that takes the data from multiple x-ray images. A CT scan can reveal some soft-tissue and other structures that cannot be seen in conventional X-rays. *See* www.medterms.com/script/main/art.asp?articlekey=2878.

large pleural effusion and his doctor discussed this finding with him and reviewed his history of exposure to asbestos. Accordingly, Murphy had failed to comply with the Rolling Bar Date.

The District Court for the Southern District of New York (the “District Court”) affirmed the Keating Memorandum Decision on June 7, 2006. *See Keating v. United States Lines*, No. 04 Civ. 6614 (LTS)(FM), 2006 WL 1559237 (S.D.N.Y. June 7, 2006). The District Court upheld the Court’s use of New York law as an interpretative guide of the injury manifestation language used in the Rolling Bar Date Order. *Id.* at *2. It found that the Judge Gonzalez “was not construing or applying a statute of limitations in making his determination as to whether [] claims were barred under the May 23, 2000, Order. Rather, he was construing the terms of that prior court order, which was entered pursuant to the claims administration powers granted to the Bankruptcy Court by federal bankruptcy law.” *Id.* The District Court also affirmed the Court’s application of the manifestation standards to the proofs of claims of Keating and White under the Rolling Bar Date Order (on appeal, Murphy unsuccessfully challenged the application of the Rolling Bar Date Order to his proof of claim). *Id.* at *4.

C. Prior Expunged Claims of the Claimants

All of the Claimants had prior claims expunged by an order of the Court on March 8, 2000 (the “March 2000 Order”). The Claimants argue, and the Trust agrees, that each of the current claims is a second injury malignancy claim that is “recognized as separate and distinct from the earlier non-malignancy claims which have been expunged.” *See* Opposition Brief, Dkt. No. 5435 at 5. Since these are second injury claims, the relevant physical condition is related to the malignancies, not the non-

malignancy asbestos claims that were expunged. *Id.* The Trust argues that the significance of the prior claims is that each claimant had a history of asbestos exposure and an asbestos-related condition that should have made them and their attorneys and doctors “more keenly aware of potential future asbestos-related illnesses.”³ The expert doctor for the Trust observes that it is well established that “once there is medical evidence of prior exposure, for example x-rays showing scarring, such as records of each of these claimants discloses, there is an increased incidence of certain cancer-related illnesses.” (Reply Certification of Dr. Duberstein, Dkt. No. 5439.)

D. *The Claimants’ Proofs of Claim*

1. Arroyo

A claim, number 03619100, was filed on Arroyo’s behalf on July 19, 2005. The claim is based on alleged tortuous exposure to asbestos during the course of employment with the Debtor for violations and damages recoverable under the Jones Act, 46 U.S.C. App. § 688 et seq. (the “Jones Act”), and the General Admiralty and Maritime Law Doctrine of Seaworthiness (the “General Maritime Law”). Arroyo’s sailing career totaled 6,933 days, of which 287, or 4.14%, were sailed on Trust-related vessels, where he was allegedly exposed to asbestos. As stated above, Arroyo had filed a previous claim against the Trust, which was expunged by the March 2000 Order (Arroyo had been diagnosed in 1996 with “acute or chronic loss of functioning aveoli resulting from a parenchymal lung disease (e.g., asbestosis).”).

³ The Trust also argues that, because of the prior claims, each claimant here “was represented by counsel on both the date of manifestation of manifestation and diagnosis.” This argument does not merit much attention from the Court. That the claimants had previously retained attorneys does not mean that the attorneys and claimants had a continuous relationship or that the claimant was “represented” in any meaningful sense on the date of manifestation.

In May 2003, a mass in Arroyo's lung was discovered via a CT scan, and the medical staff discussed with Arroyo about conducting a further "work up." In March 2004, a chest x-ray revealed a density in the left upper lobe of the lungs larger than the one revealed in a May 2003 x-ray. On a follow-up visit on April 9, 2004, Arroyo was referred for a follow-up CT scan. On May 14, 2004, a medical report indicates that Arroyo's doctors discussed the possibility of cancer with him, although Arroyo denies this.⁴ During a clinic visit on September 9, 2004, it was noted that the patient still had not gone for a follow-up CT scan, which had been recommended to Arroyo in April 2004. On December 21, 2004, because of Arroyo's progressively worsening shortness of breath and difficulty breathing, emergency medical personnel were called to his home and Arroyo was subsequently hospitalized. Soon after, a chest x-ray on December 25, 2004, chest x-ray revealed soft tissue densities. In February 2005, while hospitalized for his heart disease, non-small cell carcinoma was diagnosed.

2. Brin

Two proofs of claim, claim numbers 03615700 and 03615800, were filed on Brin's behalf on August 16, 2004. The claims are based on alleged tortuous exposure to asbestos during the course of employment with the Debtor for violations and damages recoverable under the Jones Act and the General Maritime Law. As noted above, Brin had filed a previous claim that was expunged by the March 2000 Order. (In 1992 and 1999, Brin had medical diagnoses that were compatible with the diagnosis of asbestosis.)

⁴ Because of this factual dispute, the Court did not consider the doctor's statement or Arroyo's denial in its analysis. Although with the denser lung mass, Arroyo's history of being a "chronic" and "heavy smoker," and his documented exposure to asbestos, it is unlikely that a responsible doctor *would not* discuss the possibility of cancer with Arroyo on one of his regular visits to this particular clinic.

On February 20, 2004, Brin was admitted to Parkway Regional Medical Center with increasing weakness and shortness of breath that had begun in approximately October 2003. According to the relevant medical records, Brin was admitted with a large mass that had “been growing very slowly for the past few years but more significantly over the last six months.” In October 2003, this mass became ulcerated and began bleeding. Records indicated that Brin had been aware of the left anterior chest mass for approximately eight years. The eventual diagnosis was mesothelioma although large cell carcinoma was not excluded. Brin died on March 4, 2004.

3. Cruz

A proof of claim, number 03616500, was filed on Cruz’s behalf on November 1, 2004. The claim is based on alleged tortuous exposure to asbestos during the course of employment with the Debtor for violations and damages recoverable under the Jones Act and the General Maritime Law. As noted above, Cruz had filed a previous claim that was expunged by the March 2000 Order. (In 1993, a chest x-ray revealed pleural plaque, which, according to a medical report interpreting the x-ray, is “an indication of previous asbestos exposure and often seen on chest x-rays of individuals who are suffering from asbestosis.”)

Cruz, a cigarette smoker, had a history of non-insulin diabetes mellitus, hypertension, chronic obstructive pulmonary disease, and prostate cancer. During a pulmonary consultation on May 4, 2004, Cruz indicated that he had been told three months earlier, in approximately January, that he had a left pleural effusion. During this consultation, the records indicate that Cruz had indicated he had been “increasingly short of breath over the last several weeks.” Cruz’s medical records indicate that a large left

pleural effusion was noted in an x-ray from April 2004, after which a CT scan was recommended.⁵ An x-ray, performed on April 22, 2004, indicated “a large amount of fluid in the left chest, as well as atelectasis of the left lower lobe.” Cruz was admitted to a hospital on May 4, 2004, and died of non-small cell lung cancer on May 10, 2004.

4. Todalin

A proof of claim, number 03621100, was filed on Todalin’s behalf on September 29, 2004. Todalin sailed on Trust-related vessels for 78 days during a sailing career consisting of 10,964 days (.71%). The claim is based on alleged tortuous exposure to asbestos during the course of employment with the Debtor for violations and damages recoverable under the Jones Act and the General Maritime Law. As noted above, Todalin had filed a previous claim that was expunged by March 2000 Order. (According to a medical tests in 1991 and 1996, Todalin exhibited conditions compatible with a diagnosis of asbestosis.)

On October 12, 2004, a chest x-ray revealed a 2.5 cm nodular density in the right upper lobe. The accompanying report indicated that “an abnormal lung mass cannot be excluded.” In October 2004, a medical report indicated a “very faint, pain(t) [sic] brush-like infiltrate in the right upper lobe.” Opposition Brief, Dkt. No. 5435, Exh. 3, Aff. of Dr. Arthur L. Frank, re: Todalin. Todalin fell and hurt his ribs in April 2005, which led to medical testing that revealed the lung cancer in May 2005. Todalin died of metastatic lung cancer in November 2005.

E. Trust’s Motion to Expunge Claimants’ Proofs of Claims

⁵ The Trustee and Dr. Duberstein reference a March 25, 2004 x-ray but they did not attach any corresponding medical records to support this reference.

On October 31, 2006, the Trust filed a motion and a brief in support of that motion for an order expunging the Claimants' proofs of claim based upon the failure to comply with the Court's Order that established Rolling Bar Date, requiring claimants "to file a Proof of Claim before the 181st day following manifestation of the underlying bodily injury which is the basis for the claim." Attached to the notice of motion is a certification of the Trustee in support of the motion to expunge the claims (the "Trustee Certification"), and a Certification of Dr. Joel L. Duberstein (the "Duberstein Certification"). Dr. Duberstein, who is certified in internal medicine and pulmonary diseases, was asked by the Trustee to examine the medical records of the Claimants and give his opinion pertaining to the Claimants' medical conditions. The Claimants filed a reply in opposition to the motion to expunge the claims on November 20, 2006 (the "Opposition Brief"). Attached to the opposition was a Certification of Dr. Arthur L. Frank. Dr. Frank is board certified in Occupational Medicine and Internal Medicine, and indicates he has been engaged in asbestos-related research for over thirty-five years.

The Trust filed a reply brief,⁶ and the Claimants then filed a sur-reply.⁷ Although the Claimants did not seek Court permission to file this, the Trust indicated it would not file papers in response and elected to respond orally at the December 6, 2006 hearing, where the Trust moved to expunge the Claimants' respective proofs of claims.

III. DISCUSSION

A. Manifestation Standards

⁶ Reply Brief In Support of Motion to Expunge Claims Based Upon a Failure to Comply with Rolling Bar Date, dated November 29, 2006 (the "Trust's Reply Brief").

⁷ Sur-Reply to Trust Reply to Claimants' Opposition to Motion to Expunge Claims, dated December 4, 2006 (the "Sur-Reply Brief").

The Rolling Bar Date Order provides that all future claimants must file a claim “before the 181st day following manifestation of the underlying bodily injury which is the basis for such Claim.” (Rolling Bar Date Order at 3.) Under New York law, “the time for bringing the action begins to run . . . when the injured party discovers the primary condition on which the claim is based” or should have discovered it through the exercise of reasonable diligence. *Wetherill v. Eli Lilly & Co.*, 89 N.Y.2d 506, 509 (N.Y. 1997); see N.Y. C.P.L.R. § 214-c(2) (McKinney 2003).⁸ New York’s concept of primary condition discovery requires a showing of a manifestation of a significant classic symptom of the specific occupational-related disease. See *Cochrane v. A C and S, Inc.*, No. 92-8841, 1998 WL 642719, at *8 n.1 (S.D.N.Y. Sept. 18, 1998). An unqualified diagnosis of the cause of the symptoms or plaintiff’s understanding of the cause of the symptoms is not necessary. *Id.* at *3. “Once recognizable symptoms of a condition are sufficiently present, the limitations period begins to run.” *Id.*

As made clear in decisions such as the Keating Memorandum Decision, the relevant time period begins to run from the date of the manifestation of the symptoms, not the date that the injured party is informed of the diagnosis of such symptoms. *Id.*

The Court of Appeals in *Wetherill* held that discovery of injury in toxic torts cases occurs within the meaning of C.P.L.R. § 214-c(2) when the plaintiff “discovers the manifestations or symptoms of the latent disease that the harmful substance produced.” 89 N.Y.2d at 514. Further, the Court of Appeals clarified that when New York’s

⁸ C.P.L.R. § 214-c(2) provides the three year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier

legislature used the phrase “discovery of injury,” it meant discovery of the physical condition and not “the more complex concept of discovery of both the condition and the nonorganic etiology of that condition.” *Id.*

“Thus, the statute of limitations begins to run upon discovery of the injury, even where the plaintiff is ‘unaware that the injury was caused by a particular human, rather than a natural, cause.’” *See Cochrane*, 1998 WL 642719, at *3 (citing *Golod v. Hoffman La Roche*, 964 F. Supp. 841, 850 (S.D.N.Y. 1997)). Once recognizable symptoms of an illness are present, the limitations period begins to run. *Id.* “Neither an ‘unqualified diagnosis’ of causation nor plaintiff’s understanding of such is necessary.” *Id.* (citing *Oeffler v. Miles*, 241 A.D.2d 822, 825-26, 660 N.Y.S.2d 897, 899-900 (3d Dep’t 1997)).

In *Cochrane*, the district court found that “shortness of breath and its related difficulty are symptoms or manifestations of the injury attributed by the plaintiff to his exposure to asbestos,” but cautioned that “isolated and generic symptoms of shortness of breath do not suffice” to start the running of the statute of limitations. 1998 WL 642719, at *6-7. *See also Wetherill*, 89 N.Y.2d at 514 n.4 (New York’s Court of Appeals recognized that symptoms may be “too isolated or inconsequential” to be considered manifestation of the illness). Pleural effusions and awareness of a mass in the lungs have also been held to be manifestations of asbestos-related disease. *See Bence Memorandum Decision*, at 14 (pleural effusion); *Keating Memorandum Decision*, at 25-27 (pleural effusions and lung mass).

B. Burdens of Proof

Under New York law, the party invoking the statute of limitations bears the burden of proving this affirmative defense. *See Bano v. Union Carbide Corp.*, 361 F.3d

696, 710 (2d Cir. 2004). However, if the defendant shows that the claim is untimely, the burden shifts to the plaintiff to establish that it comes within an exception to the time bar. *See Pompa v. Burroughs Welcome Co.*, 259 A.D.2d 18, 22 (3d Dep't 1999); *see also In re St. Johnsbury Trucking Co.*, 206 B.R. 318, 323 (Bankr. S.D.N.Y. 1997) (once a party negates the *prima facie* validity of a proof of a claim, the burden shifts back to the claimant who bears the ultimate burden of persuasion). Here, then, a properly filed proof of claim constitutes *prima facie* evidence of the validity and amount of the claim. Once, however, the Trust negates the *prima facie* validity of the proof of claim by showing the failure to comply with the Rolling Bar Date, the claimants have the ultimate burden to demonstrate the Proof of Claim was timely filed or some other grounds, in the Bankruptcy Code and Rules, on which the claim should be allowed. *See also Keating*, 2006 WL 1559237, at *5 (“Judge Gonzalez’ determination that claimants bore the ultimate burden of proving the validity of their claim was, accordingly, correct, as was his determination that Appellants had failed to carry their burden”).

C. Determination of the Claims At Issue

1. Arroyo’s Claim

Since Arroyo filed a proof of claim on July 19, 2005, if his illness manifested prior to January 20, 2005, this would indicate that the 180-day Rolling Bar Date had expired at the time of filing, and, thus, his claim would be untimely.

The Court finds that the Trust has satisfied its burden to refute the *prima facie* validity of Arroyo’s claim by showing that the claim is untimely because it was filed after the 180-day period of the Rolling Bar Date. Specifically, the Trust notes, *inter alia*, that in May 2003, a mass was discovered in Arroyo’s lung and his doctor discussed a need for

a further, more detailed evaluation, or “work up.” In March 2004, a chest x-ray revealed a density in the left upper lobe of the lungs that was denser than the one revealed in the May 2003 x-ray. On a follow-up visit on April 9, 2004, Arroyo was referred for a follow-up CT scan. On December 21, 2004, Arroyo had such difficulty breathing and shortness of breath that emergency medical personnel were called to his home and Arroyo was subsequently hospitalized. Soon after, a chest x-ray on December 25, 2004, revealed soft tissue densities. As noted in the section above on prior decisions, increased shortness of breath and growing lung masses are symptoms of asbestos-related disease. Given the above facts, it is clear that there had been a manifestation prior to January 20, 2005. The Court finds that Arroyo has not shown that his claim is timely or that there is some other legal basis for its allowance.

2. Brin’s Claim

Two proofs of claim were filed on Brin’s behalf on August 16, 2004. This means his illness could not have manifested later than February 18, 2004, to make his claim timely under the 180-day Rolling Bar Date.

The Court finds that the Trust has satisfied its burden to refute the *prima facie* validity of Brin’s claim by showing that the claim is untimely because it was filed after the 180-day period of the Rolling Bar Date. At the time of his admittance to the hospital in February, which was shortly before his death, Brin stated that a large lung mass, that he had been aware for the past eight years, began to grow more significantly in the past six months. The reports also indicate that Brin had experienced increasing weakness and shortness of breath, and bleeding and ulceration of the lung mass, beginning in October 2003. Although Dr. Frank states that no reasonable thought would have been given to the

fact that a chest mass lasting at least eight years was mesothelioma, the Claimant does not need to be precisely aware of the exact illness if he is aware of the symptoms. Although it is not clear that the bleeding and ulceration of the lung mass are symptoms of mesothelioma, a growing lung mass and increased weakness and shortness of breath, which all manifested in October 2003, are symptoms of asbestos-related diseases. Given the above facts, it is clear that there had been a manifestation prior to February 18, 2004. The Court finds that Brin has not shown that his claim is timely or that there is some other legal basis for its allowance.

3. Cruz's Claim

A proof of claim was filed on Cruz's behalf on November 1, 2004. Thus, if his illness had manifested prior to May 5, 2004, the 180-day Rolling Bar Date expired at the time of filing and his claim would be untimely.

The Court finds that the Trust has satisfied its burden to refute the *prima facie* validity of Cruz's claim by showing that the claim is untimely because it was filed after the 180-day period of the Rolling Bar Date. During a pulmonary consultation on May 4, 2004, Cruz indicated that he had been told three months earlier, in approximately January, that he had a left pleural effusion. During this consultation, the records show that Cruz had indicated he had been "increasingly short of breath over the last several weeks" and that he had experienced an unusual weight loss in the previous month. Cruz's medical records indicate that a large left pleural effusion with right lower lobe infiltrate was noted in an x-ray from April 2004, which was discussed with Cruz on May 4, 2005. As noted above, pleural effusion and increased shortness of breath are

symptoms of asbestos-related disease.⁹ Given the above facts, it is clear that there had been a manifestation prior to May 5, 2004. The Court finds that Cruz has not shown that his claim is timely or that there is some other legal basis for its allowance.

4. Determination of Todalin's Claim

A proof of claim was filed on Todalin's behalf on September 29, 2005. Thus, the Court looks to see if his illness had manifested prior to April 2, 2005. If so, the 180-day Rolling Bar Date expired prior to the time of filing and his claim would be untimely.

The Court finds that the Trust has not satisfied its burden to refute the *prima facie* validity of Todalin's claim by showing that the claim is untimely because it was filed after the 180-day period of the Rolling Bar Date. Aside from medical reports and diagnostic tests dating before Todalin's first injury claim, which was expunged, the Trust relies on a single chest x-ray dated October 12, 2004 that revealed a nodular density in the right upper lobe and an accompanying report stating that "an abnormal lung mass cannot be excluded." Motion to Expunge, Dkt. No. 5432, Trustee Cert., Exh. G, report of Kaiser Permanente. However, the Trust's doctor, although he makes note of the 2.5 cm nodular density in the right upper lobe, does not argue that a nodular density is a recognizable symptom of asbestos-related disease. Dr. Duberstein "does no more than observe that a 2.5 cm nodule was present. He does not offer an opinion on what it could have meant or whether Mr. Todalin would have actually experienced it's [sic] presence." Opposition Brief, Dkt. No. 5435 at 3. In fact, Todalin's doctor states that the density was noted by the medical staff as a "very faint, pain[t] [sic] brush-like infiltrate in the right upper lobe." Dkt. No. 5435, Exh. 3, Dr. Frank Aff. re: Todalin. There are no facts that

⁹ Although Dr. Duberstein did not cite it as a symptom, there is medical literature that indicates weight loss is a symptom of mesothelioma. See www.mesotheliomaweb.org/symptoms.htm.

indicate that any symptoms of asbestos-related disease had manifested in Todalín's case. Accordingly, the Trust's motion to expunge Todalín's claim is denied.

IV. CONCLUSION

Based on the foregoing, the Court concludes that (1) the proofs of claims of Arroyo, Cruz, and Brin are not in compliance with the Rolling Bar Date because each proof of claim was filed more than 180 days after the manifestation of each of their injuries, and (2) Todalín's proof of claim was timely filed. Therefore, the Court grants the Trust's motion to (1) expunge proofs of claim numbered 03615700, 03615800, 03616500, and 03619100, and (2) denies the motion to expunge claim number 03621100.

The Trust is to settle a separate order consistent with this opinion for each of the Claimants.

Dated: New York, New York
March 7, 2007

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE